TESTIMONY TO THE SUBCOMMITTEE ON COURTS OF THE HOUSE JUDICIARY COMMITTEE

RE: HOUSE BILL 2267 (SESSION OF 1998)

MAY 27, 1998

TO: THE HONORABLE MEMBERS OF THE SUBCOMMITTEE

Thank you for the opportunity to testify regarding H.B. 2267. My name is Robert E. Rains and I am a professor at The Dickinson School of Law of The Pennsylvania State University where I teach Family Law and am a Co-director of our Family Law Clinic in which supervised upper level students represent indigent clients in family law matters. I am an active member of the PBA Family Law Section as well as the Joint State Government Commission Advisory Committee on Domestic Relations Law. I wish to make two disclaimers this morning. First, I address this matter as a family law professor and practitioner, but disavow any expertise in probate law or practice. Also, these remarks are my own, and represent neither The Pennsylvania State University nor any professional organization of which I am a member.

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H.B. 2267 has been drafted in response to case law in Pennsylvania that, in the absence of a binding agreement to the contrary, a decedent can disinherit his or her minor unemancipated children. That view was most recently articulated in *Garney v. Estate of Hain*, 439 Pa. Super. 42, 653 A.2d 21 (1995) which affirmed a decision from Cumberland County, the county in which I practice. Although this doctrine seems to be long settled by the courts of Pennsylvania, today it represents an historical anachronism. Indeed, if one examines the cases from which the doctrine developed, it appears that the Pennsylvania

courts extended the reasonable doctrine that a parent can disinherit an adult child to allow a parent to disinherit a minor child, without any significant consideration of the difference between these two groups of children.

While the courts have consistently applied this doctrine, they have equally consistently noted that the legislature can change it. Over thirty-five years ago, the Pennsylvania Supreme Court stated:

> It may or may not be humane and wise for the legislature to change the law which has existed for several centuries and require a parent to bequeath a substantial portion of his estate to his legitimate and illegitimate child or children, irrespective of his feelings for them or how they have treated him, but until such a change is made by the legislature the contention of the contestant has, as we shall see, no basis in logic, or in law. *Sommerville Will,* 406 Pa. 207, 177 A.2d 496 (1962).

Similarly, in *Garney*, the Superior Court stated,

> Further, we agree with the trial court that it is not the role of the judiciary to legislate changes in the law which our legislature has declined to adopt.

Thus, there is no suggestion in the reported decisions that the General Assembly is without authority to act, only that the courts will continue to defer to its inaction.

I fully support the concept that the General Assembly should legislate to prevent parents from disinheriting children to whom they would owe a duty of support. It makes little sense to me that a parent can disinherit a minor unemancipated child (or, for that matter, a disabled adult child) who, as a result, would suffer financial harm, and possibly become indigent or even a public obligation. Therefore I totally agree with the impetus behind this bill.

Nevertheless, I have severe reservations about H.B. 2267. It appears to me that bill as drafted is unclear, possibly unworkable, and might not even cure the result in *Garney*.

In *Garney*, based on a stipulation of facts in the trial court, the parties had been married for almost eight years. There were two children born of the marriage, and a third child was born out of wedlock, whose paternity was neither agreed nor challenged. All three children had their father's last name and lived with him from the dates of their births until the date of his death, except that the second child left her father's home roughly three months before his death in September 1992 and moved in with her mother. The father made a will in 1986 which left his estate to his second wife, but provided that his four children (including one by the second wife) would be contingent beneficiaries in the event that his second wife did not survive him by sixty (60) days. There was no court order for child support nor a contractual agreement to provide support for the decedent's three children by his first wife at the time of his death. (Of course, there would have been no reason for a support order or such an agreement, at least with regard to the two children who were living with him.) When the father died, their stepmother declined to care for her step-children who, it appears, all then went back to live with their mother.

Section 3307(b), in H.B. 2267 states that, "upon the death of a parent of a minor and unemancipated child, the obligation of an estate to pay child support shall continue...." How are the courts to interpret the phrase "shall continue?" The gist of *Garney* is that there was no support order or agreement to be continued. Thus in the absence of a prior order or agreement, the court would not create a new obligation. (A review of the case law suggests that even if there were a regular court order for child support, that might not, under current

law, continue in effect in Pennsylvania after the death of the obligor. *See Fessman Estate*, 386 Pa. 447, 452, 126 A.2d 676, 678 (1956). That problem would arguably be corrected by H.B. 2267.) To me, the implication of using the phrase "shall continue" is that the result in *Garney* would not change if H.B. 2267 were enacted. The courts would still likely say that there was no pre-existing obligation and thus none to be continued. If H.B. 2267 were enacted, how are the courts supposed to deal with the situation where there is no pre-existing support order?

Not only is it unclear whether H.B. 2267 would solve the *Garney* problem, but the bill leaves a host of difficult issues unresolved:

What effect would this bill have upon a will? Does the General Assembly contemplate that the minor child could file an election against the will? If so, who would have standing to act on behalf of the minor child? What time limitation would there be on filing an election? (*See* Pa. C.S. § 2210(b).)

What does it mean that "the court shall order an amount set aside in reasonable proportion to the extent necessary for support of minor and unemancipated children?" Does the bill only apply if the decedent has not left adequate funds to the child's custodian for the care and nurturing of the child? Likewise, should the court consider any insurance proceeds or Social Security benefits that flow from the decedent to the child? (Although the Superior Court's decision in *Garney* is silent on this subject, it was stipulated below that, "all four children above-named are receiving Social Security benefits." *Garney v. Estate of Leslie Hain*, 43 Cumb. 234, 238 (1994).) Of course, there is no guarantee that any minor child will receive Social Security benefits on the account of a deceased parent. In order for a child

to receive such benefits, there are a number of requirements, including that the deceased parent be "fully insured" under the provisions of the Social Security Act. *See* 20 C.F.R. §§404.110 and 404.350. Moreover, Social Security benefits are subject to a reduction if the total monthly benefits payable on an account exceed the "family maximum" payable on the decedent's account. *See* 20 C.F.R. § 404.403. (In this regard it is noteworthy that the Superior Court has consistently held that there is a presumption that a parent is entitled to receive credit against his child support obligation for Social Security payments made directly to his minor children. (*See Preston v. Preston*, 435 Pa. Super. 459, 646 A.2d 1186 (1994).)

In determining the amount to be set aside, is the court somehow to be guided by the Support Guidelines found in Rule 1910.16 based upon the decedent's last known income while working before his death? Or should the court look to the size of the estate?

Does the bill envision that the court will direct that this money be paid in a lump sum to the child's guardian? Or, is the court supposed to create some sort of fund which the court will monitor or administer until the child reaches the age of majority or becomes emancipated? Are the funds that are set aside supposed to be administered by the probate court, the domestic relations section of the court, the custodian, or by some other person or entity?

Is H.B. 2267 purposely limited to protection for minor and unemancipated children? Under current law in Pennsylvania, "there is a duty on parents to support a child that has a physical or mental condition, which exists at the time the child reaches its majority, that prevents the child from being self-supporting." *See Hanson v. Hanson*, 425 Pa. Super. 508,

625 A.2d 1212 (1993). It would appear that H.B. 2267 would not protect such adult children who are incapable of supporting themselves.

Finally, does the bill intend that an estate could potentially remain open for over seventeen years?

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With respect, it appears to me that these are difficult issues which this Committee must address before endorsing H.B. 2267. I fully concur with Judge Del Sole's dissent in *Garney*, but he too is unclear as to how a remedy should be fashioned. The bottom line is that H.B. 2267 as currently written, while well-motivated, is unclear and does not address the practical realities of how it would have to be administered by the courts. Assuming that there is general agreement that the law should be rectified in this area, I hope that the General Assembly - with input from the Probate Bar and the Family Law Bar - can come up with realistic methods for doing so. Thank you.

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